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No. 80-291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RONALD C. MILLER,

Petitioner,

—v.—

JANET C. MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION

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September, 1980

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court is precluded by Article VI, Paragraph 2, of the United States Constitution, from awarding a spouse a portion of a military retirement benefit in a divorce action.
2. Whether the Montana Supreme Court may allow the spouse's portion of a military retirement benefit to be paid to the heirs or estate of the spouse upon death.
3. Whether the "tax consequences" of an award of a portion of a military retirement benefit constitutes a denial of equal protection of the laws.

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JURISDICTION

A Federal question was never presented to the Court below respecting the alleged denial of equal protection that is claimed in the third question presented for review. Since this collateral matter is presented here for the first time, this Court has no jurisdiction regarding this matter. 28 U.S.C., Section 1257; *Cardinale v. State of Louisiana*, 89 S.Ct. 1161, 394 U.S. 437, 22 L.Ed.2d. 398; *Tacon v. State of Arizona, 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d. 346.*

STATUTES INVOLVED

See Appendix A.

SUMMARY OF ARGUMENT

The retirement benefits resulting from years of military service as an officer add a special and unique quality to the profession, inducing people to make it a lifetime career. When expressed in monetary terms, the value of these benefits is so great when compared with the retirement benefits of either the private sector or other governmental positions, there is no individual need to save for retirement. When a divorce occurs after retirement, the value of the other marital assets is often insignificant when compared with the value of the military pension.

Following that pattern here, the monetary value of the lifetime retirement benefits (approximately $442,000.00) constituted substantially all of the parties' assets. The Montana Supreme Court, properly recognizing this fact, chose to award the Respondent an equitable portion of the pension received by the Petitioner, determining that it was an asset acquired by the parties during their marriage. The Montana Supreme Court chose not to permit the Petitioner, who initiated the dissolution proceeding, to depart with substantially all of the marital assets, or to allow his young, new wife to obtain all of the benefits earned by the Respondent during the nineteen year marriage.

Petitioner argues that *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d. 1, prohibits that result. However, there this Court expressly found a stated Congressional intent preventing a divorced spouse from obtaining a portion of a railroad retirement benefit, declaring that absent such an expression of intent the result would have been otherwise. Congress has remained silent on the issue of whether a State Court can award a portion of a military retirement benefit in a divorce action. *Revenue Ruling* No. 69-471. Because of this Congressional silence, the Supremacy Clause should not be invoked to override the subject of domestic relations which is properly within the domain of the States, thereby causing a grossly unfair property division.

The Federal statutes involved in the Military Retirement Act actually give rise to an inference of a Congressional

intent opposite to that found in *Hisquierdo*. Recognizing the limitations of *Hisquierdo*, five State Courts confronted with the issue have distinguished it and allowed an equitable division of military retirement benefits in divorce actions. The State of Alaska is the exception. Four times, this Court has refused to review State Court decisions decided in the same manner as the case presented here.

The decision of the Alaska Supreme Court in *Cose v. Cose*, 592 P.2d. 1230, is presently before this Court on a Petition for Writ of Certiorari (U.S. Supreme Court No. 79-1469), thereby granting this Court an opportunity to review that decision. Here, the decision of the Montana Supreme Court is supported by both case and statutory law and reaches the only equitable result. Therefore, the Petition should be denied.

ARGUMENT

1. The Purported Conflict to Justify the Writ of Certiorari.

The great majority of State Courts have ruled that it is proper to award a spouse a portion of a military retirement benefit in a divorce action. *In Re Fithian*, 111 Cal.Rptr. 369, 10 Cal.3d. 592, 517 P.2d. 449, cert. den., 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d. 48, reh. den., 419 U.S. 1060, 42 L.Ed.2d. 657, 95 S.Ct. 644. *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d. 53; *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d. 659; *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d. 755; *Czarnecki v. Czarnecki*, 123 Ariz. 466, 600 P.2d. 1098; *Busby v. Busby*, (Tex., 1970), 457 S.W.2d. 551; *Payne v. Payne*, 82 Wash.2d. 573, 512 P.2d. 736. *In Re Marriage of Musser*, 70 Ill.App.3d. 706, 388 N.E.2d. 1289; *Swope v. Mitchell* (La.App. 1975), 324 So.2d. 461; *Chisnell v. Chisnell*, 82 Mich.App. 699, 267 N.W.2d. 155; *Schissel v. Schissel*, (Iowa, 1980), 292 N.W.2d. 421; and *Miller v. Miller*, _____ Mont. _____, 609 P.2d. 1185. Contra: *Cose v. Cose, supra; Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d. 367; and Ellis v. Ellis*, 191 Colo. 317, 552 P.2d. 506.

Since *Hisquierdo* has been decided, five Courts have dis-

tinguished it and have ruled that a spouse is entitled to be awarded a portion of a military retirement benefit in a divorce action. *Czarnecki v. Czarnecki*, supra; *Miller v. Miller*, supra; *In Re Marriage of Musser*, supra; *Schissel v. Schissel*, supra; and *Henn v. Henn*, 26 Cal.3d. 323, 161 Cal.Rptr. 502, 605 P.2d. 10. In *Stephens v. Stephens*, 93 N.M. 1, 595 P.2d. 1196, the New Mexico Supreme Court, in interpreting Tennessee Law, came to the same conclusion without considering *Hisquierdo*. However, in *Cose v. Cose*, supra; the Alaska Supreme Court has ruled that *Hisquierdo* prohibits the division of military retirement benefits in a divorce action.

With the notable exception of *Cose v. Cose*, supra, the State Courts have not rendered conflicting opinions on the present question. Again with the exception of *Cose v. Cose*, supra, the states that have disallowed the division of a military pension have done so solely upon the interpretation of State law, without considering the issue of whether the divisibility of a military pension offends the Supremacy Clause. *Fenney v. Fenney*, supra; *Ellis v. Ellis*, supra. Consequently, there exists no justification for granting a Writ of Certiorari within the purview of Rule 17 of the United States Supreme Court Rules. The conflicting decision of *Cose v. Cose*, supra, is presently before this Court on a Petition for a Writ of Certiorari which Petition can be granted by this Court to alleviate any conflict between the State Courts on this issue.

The Petitioner's assertion that there exists a conflict between the decisions of the Federal Courts and those of the State Courts is simply imagined. The only Federal Court dealing with the issue of whether a portion of a military pension can be awarded in a divorce action is *Bodenhorn v. Bodenhorn*, (C.A. 5th Cir., 1978), 567 F.2d. 629. Here, the Fifth Circuit Court of Appeals in applying Canal Zone Law held that non-vested Army retirement benefits constituted community property and could be divided in a divorce action.

The Petitioner's reliance upon *Watson v. Watson*, (D.C.N.C., 1976), 424 F.Supp. 866, is misplaced. Here the Court held that under North Carolina law, it was imper-

missible to garnishee the Defendant's military retirement benefits to pay alimony because North Carolina law disallowed garnishment for wages. The issue of whether the Court had properly allowed the spouse to obtain a portion of the military retirement benefits was not discussed.

The Petitioner's reliance upon *Milhan v. Milhan*, 158 Cal.Rptr. 523, is also flawed. Here, an intermediate California Appellate Court held that *Hisquierdo* applied and a wife was not entitled to receive a portion of a military retirement benefit upon divorce. However, this decision was later emasculated by the California Supreme Court in *Henn v. Henn*, supra, where the Court, in a unanimous opinion, came to the opposite conclusion.

Citing an excerpt from "Army Echoes," which has never been admitted into evidence, the Petitioner asserts that "the fact that Mr. Miller could be recalled to active service should be given much weight ..." Initially, it is difficult to conceive how a recall of Army officers could have much of an impact upon the Petitioner, who was an Air Force officer. Secondly, the lower Court awarded Janet Miller a portion of the military pension if and when it was received by the Petitioner. Consequently, even if the Petitioner's rather unfounded fears are realized and he is recalled to active duty, his military pension benefits would terminate and the Respondent would no longer be legally entitled to an award of a portion of these benefits. This matter would then be moot.

In conclusion, it is respectfully submitted that there does not exist sufficient conflict among the State and Federal Courts to justify the granting of a Writ of Certiorari. Since *Hisquierdo*, the State Courts are remarkably consistent in awarding the spouse a portion of a military retirement benefit in a divorce action with the exception of Alaska.

2. The Impact of Hisquierdo.

On January 22, 1979, this Court decided *Hisquierdo*, which held that a California community property award of an interest in an expected benefit under the Railroad Retirement Act was impermissible because of the Supremacy Clause. In its holding, this Court looked to the specific

Congressional intent as expressed in the Railroad Retirement Act. However, this Court acknowledged that its holding was limited:

> In this case, Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which Federal law merely regulates. See Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C., §§1001, et seq. (29 U.S.C.S., §§ 1001, et seq.). Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics. *(Hisquierdo,* supra, at p. 16, Footnote 24).

In *Hisquierdo* this Court cited *Wetmore v. Markoe,* 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390, for the proposition that the Court's review under the Supremacy Clause was limited to a determination whether Congress had "positively required by direct enactment that State law be pre-empted." It further cited the case of *United States v. Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d. 404, for the rule that State family law must do "major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden."

In *Hisquierdo,* the Court invoked the Supremacy Clause to preclude a state from applying state community property principles to a husband's expectation of receiving railroad retirement benefits. In so ruling, the Court heavily relied upon the Congressional intent as manifested by two sections of the Railroad Retirement Act. First, Section 231d(c)(3) provided an individual benefit to a wife which terminated upon divorce. Second, Section 231m provided that benefits were not to be assignable or to be subject to garnishment, attachment, etc. Because of the positive and unequivocal conflict with a clearly defined Congressional prerogative, this Court held that a divorced wife was not entitled to receive an interest in a railroad pension.

In comparing the Railroad Retirement Act with the Military Retirement Act, it is apparent that *Hisquierdo* has no application to military retirement benefits. The portions of the Railroad Retirement Act that were heavily relied upon by this Court are conspicuously absent from the Military Retirement Act. Perhaps this is so because of the unique nature of military life where a wife is often compelled to make great sacrifices for the benefit of her husband's military career. The spouse is subject to the constant uprooting of her family that accompanies a change of duty station and further encounters irregular hours and long periods of separation that are a peculiar characteristic of military life. In the case of Janet Miller, the evidence disclosed that during a 15-year period, the family was compelled to change residences 12 times, sometimes to temporary quarters. In a one-year period, the family moved from Montana to South Carolina and then to Canada where Janet Miller maintained the family while the Petitioner accomplished a tour of duty. Furthermore, the Petitioner was often gone from the family home for extended periods of time. For example, while the parties were living in New York, the Petitioner was absent from the family home between 12 and 15 days a month. During this time, Janet Miller assumed full responsibility for maintaining the household and raising the children. Because of these duties and the Petitioner's absence, it was impossible for Janet to further any of her career plans.

Unlike the Railroad Retirement Act, the Military Retirement Act provides no separate benefit to the wife that is terminated upon divorce. The portion of the military retirement benefit awarded to Janet Miller is being received pursuant to the provisions of 10 U.S.C., Chapter 71. This chapter differs from the Railroad Retirement Act because it does not contain an anti-garnishment statute.

The Military Retirement Act at 10 U.S.C., Chapter 73, does provide for what is entitled a Survivor Benefit Plan. This chapter takes effect only at the time of the death of the serviceman and awards a maximum of 55% of his pension to his widow or surviving children. 10 U.S.C., Section 1451(a). The Survivor's Benefit Plan actually evidences a

Congressional intent to preserve a survivor's benefit even though a divorce has intervened. This occurs by virtue of the statutory definition of the term "widow" which makes it possible for a divorced spouse to receive these benefits. This definition appears at 10 U.S.C., Section 1447(3):

> 'Widow' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—
>
> (A) was married to him for at least two years immediately before his death; or
>
> (B) is the mother of issue by that marriage.

The Survivor's Benefit Plan does contain an anti-garnishment statute which is found at 10 U.S.C., Section 1450(i). This provision, however, expressly relates only to the Survivor's Benefit Plan. It does not extend to 10 U.S.C., Chapter 71, the statutes giving rise to the retirement benefits being paid to Petitioner at the present time.

The Petitioner cites 42 U.S.C., Sections 659 and 662(c), which statutes permit garnishment of a military retirement pension to pay child support or alimony but prohibit garnishment of the same for any payment or transfer of property in compliance with community property settlements, equitable division of property, or other division of property between spouses. These statutes are a part of a specific Congressional Act designed to provide aid and services to states with needy families. The statutes were designed to enable the recovery of funds paid under this plan and to relieve an already overburdened welfare system.

While prohibiting garnishment for the same, these sections do not prohibit state divorce decree remedies in connection with equitable property divisions. As indicated in *Schissel*, supra, at page 424, a distinction must be observed between a spouse's attempt to garnishee the government to collect sums from the government due a spouse and a dissolution court's consideration of that governmental obligation when prescribing the economic terms of a property division. In enacting these statutes, Congress evidently intended the states to enact their own individual reme-

dies to enforce their divorce decrees. By withholding a remedy, Congress has certainly not "positively required by direct enactment that state law be pre-empted" within the mandate of *Wetmore v. Markoe*, supra.

Because of the foregoing, *Hisquierdo* has no application to the divisibility of a military pension in a divorce action and the Supremacy Clause should not be invoked to deny Janet Miller her share of the military retirement pension.

3. The Remaining Issues.

The Petitioner asserts that he has been denied equal protection of the law because he will be compelled to bear the entire income tax burden of the military pension. Initially, the equal protection argument on the tax issue has never been raised in the lower Courts. Consequently, this Court has no jurisdiction to decide this matter because of the reasons set forth in the "Jurisdiction" portion of this Brief.

Secondly, although the equal protection argument was not presented to the Montana Supreme Court, the issue of whether the Petitioner will be compelled to pay the income tax on the entire amount of the military pension was submitted to the Montana Supreme Court. The Court obviously considered this matter to be a non-issue because *Revenue Ruling* No. 69-471 provides that a wife's interest in her husband's military retirement pension is includable as ordinary income to the wife in the years received. This determination is in line with the basis for *Revenue Ruling* No. 69-471, which is that the payments which will be received were attributable to a property interest which originally belonged to Janet Miller. For this reason, Janet Miller will pay a tax upon the portion of the military retirement benefits being received by her while the Petitioner will pay a tax on the remainder. The Petitioner's fears that he will be compelled to pay a tax upon the entire amount of the military pension are unfounded.

The Petitioner also asserts that the Montana Supreme Court improperly allowed Janet Miller's benefits to be paid to her estate or heirs in the event she pre-deceased the Petitioner. Admittedly a contrary result occurred in *In Re*

Fithian, supra. However, in doing so, the Fithian Court applied well-settled principles of community property law. Because Montana is not a community property state, a different treatment of these benefits is required. *Kruger v. Kruger*, supra. In any event, the Petitioner has failed to disclose how a ruling of the Montana Supreme Court on this issue involves a constitutional issue that would merit review by this Court.

CONCLUSION

Prior to *Hisquierdo*, this Court has twice denied certiorari in California decisions holding that military retirement pay is divisible in a divorce action. *In Re Fithian*, supra; *In Re Milhan*, 13 Cal.App.3d.129, 117 Cal.Rptr. 809, 528 P.2d. 1145, cert. den., 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d. 467. Subsequent to Hisquierdo, this Court has twice denied certiorari in two similar cases: *Starren v. Starren*, _____ Cal.3d. _____, _____ Cal.Rptr. _____, _____ P.2d. _____, (January 17, 1979—Apparently Unreported), cert. den., 444 U.S. 880, 100 S.Ct. 169, 62 L.Ed.2d. 110, and*Chisnell v. Chisnell*, supra cert. den., 442 U.S. 940, 99 S.Ct. 2881, 61 L.Ed.2d. 310, reh. den., 444 U.S. 887, 100 S.Ct. 187, 62 L.Ed.2d. 121.

The decision of the Montana Supreme Court in the instant case is similar to the decisions of *Fithian*, supra; *Milhan*, supra; *Starren*, supra; and *Chisnell*, supra. For these reasons, the Petition for Writ of Certiorari seeking review of the opinion of the Montana Supreme Court in this case should be denied.

RESPECTFULLY SUBMITTED this 4th day of September, 1980.

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APPENDIX "A"
APPLICABLE FEDERAL STATUTES

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APPLICABLE FEDERAL STATUTES

10 U.S.C., Section 1447(3):

Set forth in Petitioner's Brief.

10 U.S.C., Section 1450(i)

"(i) An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process."

10 U.S.C., Section 1451(a):

"(a) If the widow or widower is under age 62 or there is a dependent child, the monthly annuity payable to the widow, widower, or dependent child, under section 1450 of this title shall be equal to 55 percent of the base amount. However, when the widow has one dependent child, the monthly annuity shall be reduced by an amount equal to the mother's benefit, if any, to which the widow would be entitled under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410 *(l)* (1) of title 42 and calculated assuming that the person concerned lived to age 65. When the widow or widower reaches age 62, or there is no longer a dependent child, whichever occurs later, the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow or widower would be entitled under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410 *(l)* (1) of title 42 and calculated assuming that the person concerned lived to age 65. For the purpose of the preceding sentence, a widow or widower shall be considered as entitled to a benefit under subchapter II of chapter 7 of title 42 even though that benefit has been offset by deductions under section 403 of title 42 on account of work."

28 U.S.C., Section 1257:

"State courts; appeal; certiorari.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

42 U.S.C., Section 659:

Set forth in Petitioner's Brief.

42 U.S.C., Section 662(c):

Set forth in Petitioner's Brief.

45 U.S.C., Section 231d(c)(3):

"(3) The entitlement of a spouse of an individual to an annuity under section 231a(c) of this title shall end on the last day of the month preceding the month in which (A) the spouse or the individual dies, (B) the spouse and the individual are absolutely divorced, or (C) in the case of a wife who

does not satisfy the requirements of clause (ii)(A) or (ii)(B) of section 231a(c)(1) of this title (other than a wife who is receiving such annuity by reason of an election under section 231a(c)(2) of this title), such wife no longer has in her care a child described in clause (ii)(C) of section 321a(c)(1) of this title, whichever first occurs."

45 U.S.C., Section 231m:

"Assignability; exemption from levy.

"Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated: *Provided, however,* That the provisions of this section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 231a(b) of this title from income taxable pursuant to the Federal income tax provisions of Title 26."

Rule 17, United States Supreme Court Rules:

"Considerations Governing Review on Certiorari.

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."